

Kansas v. Nebraska & Colorado
No. 126, Orig., U.S. Supreme Court
Decree of May 29, 2003, 538 U.S. 720

Colorado Compact Compliance Pipeline Dispute

Non-Binding Arbitration Initiated by Notice of August 21, 2009

State of Kansas, Plaintiff,

v.

State of Nebraska

and

State of Colorado, Defendants

**Notice by Kansas Pursuant to Final Settlement Stipulation §VII.B.6
Re Arbitrator's Final Decision of October 7, 2010**

On October 7, 2010, Arbitrator Martha O. Pagel issued her Arbitrator's Final Decision ("Final Decision") in the Non-Binding Arbitration ("Arbitration") on the Colorado Compact Compliance Pipeline Proposal ("CCP Proposal") initiated by Colorado's Notice of August 28, 2009, pursuant to the U.S. Supreme Court Decree in *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003). The Final Settlement Stipulation ("FSS"), approved by the United States Supreme Court on May 19, 2003 in its Decree in *Kansas v. Nebraska & Colorado*, 538 U.S. 720 (2003), provides for the final step in the dispute resolution process in §VII.B.6 as follows:

Within 30 days of the issuance of the arbitrator's decision, the States that are parties to the dispute shall give written notice to

the other States and the United States as to whether they will accept, accept and reject in part, or reject the arbitrator's decision.

In satisfaction of FSS §VII.B.6, Kansas hereby gives notice with respect to the eight Ultimate Findings and Conclusions on pages 7-21 and the final Conclusion on pages 21-22 of the Arbitrator's Final Decision, but does so without waiving any position that Kansas has taken, and without accepting or rejecting other specific findings, conclusions or statements of the Arbitrator.

As a general matter, while the Final Decision of the Arbitrator is in favor of the State of Kansas and against the State of Colorado (Final Decision p.4), Kansas rejects the Arbitrator's denial of Kansas' Motion to Dismiss and rejects any implication by the Arbitrator that a reasonableness test is applicable to a State's participation in the Republican River Compact Administration ("RRCA") refusal to approve the CCP Proposal. Subject to the foregoing, Kansas also limits its acceptance of the Arbitrator's eight Ultimate Findings and Conclusions with respect to the eight disputed issues on pp. 7-21 of the Final Decision as follows:

1. **"Whether the CCP Proposal meets the requirements of the FSS regarding use of the Groundwater Model.**

Ultimate Findings & Conclusions

The CCP Proposal does not meet the requirements of the FSS because it does not propose use of the Groundwater Model to calculate the amount of augmentation credit. Therefore, it is not unreasonable for Kansas to withhold its consent to the CCP Proposal on this basis."

Kansas accepts the Ultimate Findings and Conclusions for Issue No. 1.

2. **"Whether the CCP Proposal would allow Colorado to replace South Fork overuse with augmentation flow delivered to the North Fork.**

Ultimate Findings & Conclusions

The CCP Proposal is not intended to allow Colorado to replace South Fork overuse with augmentation flow delivered to the North Fork for purposes of determining Compact compliance with sub-basin allocations; however, the intention should be more clearly reflected in the Proposal and related modifications to the RRCA Accounting Procedures. The CCP Proposal would allow for the use of North Fork augmentation in computing Colorado's statewide compliance; however, Kansas raises a legitimate policy question as to whether an augmentation plan may be used to artificially create a surplus in one sub-basin in order to meet the statewide compliance test. Therefore, it was not unreasonable for Kansas to withhold its consent to the CCP Proposal on this basis."

Kansas accepts the Ultimate Findings and Conclusions for Issue No. 2.

3. **"Whether Additional Operational Limits are Needed.**

Ultimate Findings & Conclusions

Additional operational limits and details are needed in the CCP Proposal to adequately incorporate Colorado's stated intentions for dealing with minimum and maximum annual deliveries. Without such changes, the CCP Proposal does not reflect changes resulting from the Stipulated Agreement entered into between Colorado and Nebraska."

Kansas accepts the Ultimate Findings and Conclusions for Issue No. 3 to the extent that they are consistent with Kansas' previously stated positions and rejects them to the extent that they are not consistent with Kansas' previously stated positions.

4. **"Whether temporal limits are needed in the CCP Proposal.**

Ultimate Findings & Conclusions

The CCP Proposal should be amended to include temporal limits. Although such limits are not specifically required under the FSS, the unique nature of the CCP Proposal as the first augmentation plan considered by the

RRCA, and the complexity of operational questions raised support the need for time limits and periodic review."

Kansas accepts the Ultimate Findings and Conclusions for Issue No. 4.

5. **"Whether the changes proposed for the RRCA Accounting Procedures in the CCP Proposal are complete.**

Ultimate Findings & Conclusions

The specific changes Colorado proposes to the RRCA Accounting Procedures are complete for purposes of implementing the CCP Plan as currently proposed; however, further changes would be needed to incorporate and address recommended changes in order to allow for final approval."

Kansas rejects the Ultimate Findings and Conclusions for Issue No. 5 to the extent that they are inconsistent with Kansas' previously stated positions and accepts them to the extent that they are consistent with Kansas' previously stated positions.

6. **"Whether Colorado's proposed 'catch-up' provisions are unreasonable.**

Ultimate Findings & Conclusions

The proposed 'catch up' provisions offer a reasonable mechanism to implement the CCP Proposal as envisioned by Colorado. However, the objections raised by Kansas are equally reasonable when the "catch up" plan is considered in the context of the CCP Proposal's overall approach for determining minimum and maximum deliveries and providing for 'catch up' as needed. Accordingly, it is not unreasonable for Kansas to withhold approval of the Proposal on this basis."

Kansas rejects the Ultimate Findings and Conclusions for Issue No. 6 to the extent that they are inconsistent with Kansas' previously stated positions and accepts them to the extent that they are consistent with Kansas' previously stated positions.

7. **"Whether it is unreasonable for Colorado to propose an expansion of its augmentation plan without a requirement of further RRCA approval.**

Ultimate Findings & Conclusions

The process Colorado proposes for authorizing possible future expansion of the pipeline is not unreasonable and does include provisions for RRCA approval. Therefore, this objection lacks merit."

Kansas rejects the Ultimate Findings and Conclusions for Issue No. 7.

8. **"Whether the refusal by Colorado and Nebraska to disclose the terms of a separate stipulated agreement is unreasonable and requires that the CCP be rejected.**

Ultimate Findings & Conclusions

The refusal by Colorado and Nebraska to disclose the terms of their stipulated agreement does not mandate that the CCP Proposal be rejected. In the absence of a motion to compel production of the documents, it is not necessary to deal directly with this issue in the Arbitration proceedings."

Kansas rejects the Ultimate Findings and Conclusions for Issue No. 8.

Subject to the foregoing, Kansas states as follows regarding the Arbitrator's Conclusion on pp. 21-22 of the Final Decision:

"VI. Conclusion

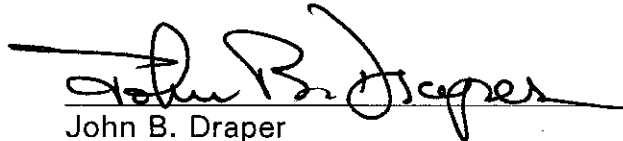
The CCP Proposal, in general, provides a reasonable and necessary approach for meeting Colorado's Compact obligations. With changes as recommended herein, the revised CCP Proposal should be approved. However, the facts presented in this Arbitration proceeding do not support a conclusion that Kansas has acted in bad faith or has breached a duty of fair dealing in questioning and challenging key aspects of the proposed augmentation plan. To be sure there is a risk that, at some point in the future, continuing objections by Kansas may suggest there is nothing that Colorado can do to develop a plan that would meet with approval by Kansas. At this stage, however, there is no basis for concluding that Kansas has acted unreasonably or that Colorado is entitled to a recommendation from the Arbitrator that the CCP Proposal should be approved."

Kansas rejects the Conclusion to the extent that it is inconsistent with Kansas' previously stated positions and accepts it to the extent that it is consistent with Kansas' previously stated positions.

By this Notice, Kansas satisfies its dispute resolution obligations under §VII of the FSS.

Respectfully submitted,

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Attorney General of Kansas
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A handwritten signature in black ink, appearing to read "John B. Draper", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I, John B. Draper, hereby certify that on the 1st day of November, 2010, I caused to be transmitted by email a copy of the foregoing Notice by Kansas Pursuant to Final Settlement Stipulation §VII.B.6, addressed to each of the following:

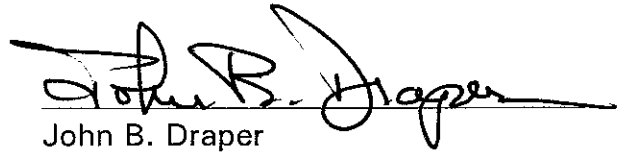
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